FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CARL LEFFINGWELL and NORMA LEFFINGWELL,

Plaintiffs-Appellants,

vs

RICK NOOK and BILL HILLMAN, d/b/a EARTH SHELTERS NOW, and EARTH AND SUN CORPORATION,

Defendants-Appellees.

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5-490
84-1166

Appeal from the Iowa District Court for Fremont County - Leo F. Connolly, Judge

Plaintiffs appeal from a remittitur order reducing the jury award from $65,432 to $25,000. **REVERSED AND REMANDED.**

Richard B. Maher of Maher & Aranza, Tabor, for plaintiffs-appellants.

Gary Gee, Shenandoah, for defendants-appellees Nook & Hillman.

Kenneth Rittgers, Des Moines, for defendant-appellee Earth & Sun Corp.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

Plaintiffs appeal from a remittitur order reducing the jury award from $65,432 to $25,000. We reverse and remand.

The parties entered into a contract whereby the defendants agreed to build an earth home for the plaintiffs. When the house was nearly completed, the plaintiffs became dissatisfied and alleged that the house was uninhabitable because of construction defects.

The Leffingwells sued the defendants for $250,000, alleging negligence and breach of contract. A jury awarded the plaintiffs damages of $65,432. However, the trial court then filed a remittitur order directing that the damage award be reduced to $25,000. The Leffingwells have appealed from this remittitur order.

The plaintiffs contend the jury's verdict was supported by the evidence. They point to evidence in the record that their repair bills would exceed $50,000, that they had devoted time, labor, and interest payments to the construction project, and that the defects had caused them mental anguish. The Leffingwells also contend the trial court erred by ordering a remittitur without giving them the option of a new trial.

The defendants-appellees have filed no brief, although they have filed a number of motions and resistances during the pendency of this appeal. In response to a motion by the Leffingwells, the supreme court has filed an order directing that the appellees be denied oral argument.

The trial court's order stated:

> That the Court after weighing all factors including the equity of the parties feels that justice is not best obtained by ordering a new trial, taking into account the expenses that would be incurred by parties, the additional time that would be expended both by the parties, the attorneys and the Court. Therefore, in taking all matters into

consideration, the Court finds that an appropriate damage 171
figure for the Plaintiffs would be in the amount of $25,000.

Iowa authority provides that in considering the various factors to grant remittitur due to the size of the verdict "the most important of these [factors] is support in the record. . . . Certainly where the verdict is within a reasonable range as indicated by the evidence the courts should not interfere with what is primarily a jury question." Mazur v. Grantham, 255 Iowa 1292, 1303-04, 125 N.W.2d 807, 814 (Iowa 1964). After reviewing the plaintiffs' injuries, the court in Mazur reiterated that "for us to interfere merely substitutes our judgment for that of the jury, this should be done with extreme caution." Id. The court then reversed and remanded to reinstate the jury verdict.

The record indicates defendants agreed to construct an earth home for the Leffingwells. After the home was nearly completed, the Leffingwells discovered that the home was not waterproofed properly, that defects existed in the concrete and walls, that the home was not at the proper elevation, and various other defects.

At trial, a professional engineer testified that various repairs, primarily removing and replacing earth, would cost $39,587. A protective waterproof membranous umbrella, at a cost of $525, was recommended to cover the structure. Testimony also indicated that the structure had settled such that the condition could only be remedied by using augered piers to stabilize the structure at a cost of $9,920. These aggregate repairs totalled $50,032. In addition, an electrician indicated that an overloaded circuit had been causing electrical problems which could be repaired at a cost of $400.

Evidence was also introduced regarding Mrs. Leffingwell's fear of living in the home and concomitant mental anguish. Apparently Mrs. Leffingwell

takes tranquilizers, has developed an ulcer, and needs professional consultation to deal with her problems.

Two affidavits from jurors indicate that the $65,432 verdict reflected the repair costs testified to by the engineer and electrician and $15,000 for mental anguish suffered by Mrs. Leffingwell.

We are convinced that the jury verdict was within a reasonable range. Therefore, we reverse and remand with directions to reinstate the verdict and to render judgment accordingly. Given our disposition of this case, we do not address the issue of trial court's duty to give the option of a new trial before ordering remittitur.

REVERSED AND REMANDED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent.

The trial court erred in ordering a remittitur without permitting a party to avoid a new trial under Iowa Rule of Civil Procedure 243 or 244 by agreeing thereto. See Iowa R. Civ. P. 250.

The plaintiffs were entitled to the finding of the jury as to the amount owed them. Until they waived that right, the court had no power to change the verdict to their prejudice. See Barber v. Maden, 126 Iowa 402, 404, 102 N.W. 120, ___ (1905).

I would reverse the remittitur and remand with instructions to render a judgment on the verdict or permit plaintiffs to elect whether to take a judgment or new trial. See Maden at 404, 102 N.W. at ___.